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SEIU, United Healthcare Workers – West

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

CHILDREN'S HOSPITAL AND RESEARCH CENTER OF OAKLAND, INC., dba CHILDREN'S HOSPITAL OF OAKLAND, Employer, and NATIONAL UNION OF HEALTHCARE WORKERS, Petitioner, and SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS – WEST, Intervenor.	Case No. 32-RC-5617 **SEIU, UNITED HEALTHCARE WORKERS – WEST'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S REPORT AND RECOMMENDATIONS**

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I. INTRODUCTION

The facts of this case are simple, straightforward, and, relatively, undisputed. Since it was formed by the ousted leaders of SEIU United Healthcare Workers – West ("Intervenor" or "SEIU-UHW") in February 2009, the National Union of Healthcare Workers ("Petitioner" or "NUHW") has desperately sought to decertify a bargaining unit of employees at Children's Hospital and Research Center of Oakland (the "Employer") that has long been represented by SEIU-UHW.[1] In carrying out its efforts, NUHW engaged in a campaign of unlawful surveillance (Objection Nos. 14 and 20), deception (Objection No. 18), illicit promises (Objection No. 22), and intimidation (Objection No. 24) prior to and on election day, August 17, 2011.

Intervenor SEIU-UHW filed timely objections to the election over NUHW's unlawful conduct, as well objections to the Employer's conduct on election day. On December 28, 2011, after a two-day hearing, Administrative Law Judge ("ALJ") Gerald M. Etchingham issued his Report and Recommendations sustaining a Board challenge to the ballot of one employee, Reginald Wright, and sustaining two of Intervenor's Objections over NUHW's unlawful conduct.

In particular, the ALJ recommended sustaining the Board's challenge to the ballot of Mr. Wright, finding that Mr. Wright arrived after the polls had closed in the morning session through no fault of Intervenor or the Employer. (Report, p. 5.) The ALJ also sustained Objection No. 18 over NUHW's unlawful alteration of an NLRB sample ballot in order to make it appear as if the NLRB supported NUHW. Finally, the ALJ sustained Objection No. 24 over NUHW's illegal photographing of employees who were engaged in protected concerted activity, finding that the testimony from Petitioner's organizer Faye Roe that she was not using her phone to take photographs was "unbelievable."[2] Intervenor does not take exception to the ALJ's recommendations in that regard.

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[1] Notably, prior to the scheduling of the election in this matter, NUHW went to great lengths to prevent a substantial number of employees of the Employer to vote in the election. Specifically, NUHW obtained an order from the National Labor Relations Board that prevented a number of the Employer's employees who are not currently represented by any labor organization from voting in this election.

[2] Roe was present during the two days of hearing before the ALJ as Petitioner's representative and also served as Petitioner's primary witness.

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Intervenor, however, takes exception to the ALJ's recommendation to overrule Objection Nos. 14 and 20 over NUHW's unlawful surveillance, the recommendation to overrule the portion of Objection No. 24 relating to NUHW's photographing of eligible voters who were en route to vote, and the recommendation to overrule Objection 22 over NUHW's unlawful promise to waive union initiation dues in exchange for voting to decertify Intervenor. In addition, Intervenor takes exception to the ALJ's recommendation to overrule Objection No. 21 over the Employer's surveillance of eligible voters and the recommendation to overrule Objection No. 30 over the Employer's discriminatory enforcement of its access policy on election day, conduct that on its own is sufficient to overturn the election. The overwhelming evidence in the record and the critical questions of law raised warrant a review of the ALJ's recommendations and a final resolution under which all eligible voters are notified of any additional unlawful conduct that interfered with the August 17, 2011 election in this matter.

Intervenor also respectfully takes exception to the ALJ's decision to deny Intervenor's request for reconsideration of the ALJ's Order revoking Intervenor's subpoena duces tecum to NUHW. Intervenor submits that it was prejudiced because it was prevented from obtaining documents, including, among other things, any notes, photographs, and leaflets that were relevant to the allegations in Objection Nos. 14, 20, 22, and 24. Intervenor submits that the Petition to Revoke the subpoena should have been denied because it was unsupported by any Board precedent.[3]

Finally, Intervenor takes a limited exception to the ALJ's recommendation that Petitioner be referred to as "National United Healthcare Workers" in the Second Notice of Election, as Petitioner is known as the "National Union of Healthcare Workers (NUHW)." Intervenor also excepts to the ALJ's denial of Intervenor's request that, as an extra ordinary remedy, NUHW be ordered to mail the Second Notice of Election to all eligible voters, a remedy that is within the Board's discretion and appropriate given the final vote tally here.

[3] In addition to these exceptions, Intervenor notes that its December 1, 2011 Request for Review of the Regional Director's November 17, 2011 Supplemental Decision on Challenged Ballots and Objections is still pending before the Board.

Thus, the record in this matter could still be reopened for additional evidence regarding any of the Objections that were overruled by the Regional Director.

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II. LEGAL ARGUMENT

A. INTERVENOR EXCEPTS TO THE ALJ'S RECOMMENDATION TO OVERRULE OBJECTION NOS. 14, 20, AND 24, AS THE EVIDENCE SUPPORTS A FINDING THAT NUHW ENGAGED IN UNLAWFUL SURVEILLANCE, INCLUDING PHOTOGRAPHING, OF ELIGIBLE VOTERS

The ALJ overruled Intervenor's Objection Nos. 14 and 20 over Petitioner's unlawful surveillance of eligible voters who were on their way to the polling site. (See Intervenor Exception ("Exception") Nos. 1, 3-6, 12-13, and 15-16.)[4] The ALJ also overruled the portion of Objection No. 24 relating to Petitioner's photographing of eligible voters who were en route to the polling site. Intervenor takes exception to the ALJ's findings and conclusions that serve as the basis for those recommendations. (See Exception Nos. 2 & 14.)

In overruling Objection Nos. 14, 20, and 24 the ALJ erred because he failed to consider the overwhelming evidence that Petitioner's organizers had a clear view of whether eligible voters who exited the hospital main entrance and walked toward the building where the polling site was located made a right turn to enter that building. Specifically, the record is full of undisputed evidence that Petitioner's organizers, together with its employee supporters, spent a considerable amount of their time on election day stationed at or near a bench by the main entrance to the hospital, including during voting times. (Transcript ("Tr.") pp. 166, 169, 175-79, 199, 236-38, 273-77, 330-33, 348, 434, 440, 442, 445, 447, 518, 521, and 547-49). It is also undisputed, in fact Petitioner's primary witness Faye Roe admitted, that from the bench by the main entrance, and from the smoking area frequented by Roe, Petitioner's organizers and its agents had a direct view of the entrance to the Outpatient Center ("OPC"), where the voting room was located. (Tr. 169, 237, 487, and 490-91). Finally, the record also contains witness testimony that Petitioner's organizers Faye Roe, Ching Lee, and Pat Alvarez stood by the main entrance and took cell phone pictures of eligible voters who were on the crosswalk walking away from the main entrance of the hospital and toward the OPC entrance.[5] (Tr. 278-282, 310, 313, 315, 349,

[4] Intervenor's Exceptions are being filed concurrently herewith.

[5] As the ALJ found, the evidence is also undisputed that NUHW's organizers unlawfully photographed the employee supporters of SEIU-UHW who were engaged in protected concerted activity.

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352, 353-54, and 358). In sum, Petitioner's organizers stationed themselves at a location where they could not only observe and photograph employees who exited through the main entrance of the hospital, but also could clearly see whether those employees entered the OPC building where the polling site was located. The ALJ's failure to consider these undisputed facts was in error.

The ALJ also erred by relying on a completely irrelevant fact, namely the unsupported allegation advanced by Petitioner that eligible voters could have used an alternate route to reach the building where the polling site was located. There is no evidence in the record to support the finding that eligible voters could have used two alternate routes to reach the polling site inside the OPC building. More importantly, even if there were two other routes, the ALJ's reliance on that finding to overrule Objection Nos. 14, 20, and 24 was in error. Whether some eligible voters used an alternate route to reach the polling site has no relevance to whether it was unlawful for Petitioner to engage in surveillance of, and to photograph, those eligible voters who made access to the polling site by taking the route where Petitioner's organizers had strategically stationed themselves throughout the day.

As a result, Intervenor requests respectfully that the ALJ's recommendations to overrule Objection Nos. 14, 20, and 24 be reversed and that the Board sustain these objections.

B. INTERVENOR EXCEPTS TO THE ALJ'S RECOMMENDATION TO OVERRULE OBJECTION NO. 22, AS THERE IS AN UNSETTLED QUESTION AS TO THE LEGALITY OF NUHW'S PROMISE TO WAIVE UNION INITIATION DUES IN EXCHANGE FOR VOTING TO DECERTIFY SEIU-UHW

The ALJ overruled Intervenor's Objection No. 22, which objected to the fact that Petitioner made promises relating to union dues in exchange for votes. Intervenor takes exception to the ALJ's findings and conclusions that serve as the basis to overrule Objection No. 22. (See Exception Nos. 10-11.) Intervenor excepts because the ALJ's recommendation raises a substantial question of law or policy for which there is no officially reported Board precedent. Specifically, there is no Board precedent addressing the facts in the record here, that is, whether it is unlawful for a labor organization that is seeking to raid the members of an incumbent union to promise to waive the union initiation dues of the entire bargaining unit in exchange for that bargaining unit's vote to decertify the incumbent union.

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As the record shows, Petitioner's organizer, Faye Roe, admitted that she informed eligible voters not only that Petitioner's monthly union dues were lower, but that if they voted to decertify Intervenor then Petitioner would waive the union initiation dues for the entire bargaining unit. (Tr. 456 and 507-08). Roe explained that under Petitioner's bylaws, "[f]or newly organized workers, there are no immediate initiation fees." (Tr. 507). It is axiomatic that the employees of the Employer in the bargaining unit represented by Intervenor are not "newly organized workers." Nonetheless, Roe admitted that she promised "workers at Children's Hospital [] that if they voted for NUHW, they would not have any initiation fees." (Tr. 508). Roe was unable to explain why the union initiation fees for employees of the Employer were being waived in exchange for their vote to decertify Intervenor. (See Tr. 507-508.) Notably, Petitioner presented no evidence that the waiver of union initiation fees was available even if Petitioner's effort to decertify was unsuccessful.

As a result, Intervenor requests respectfully that the ALJ's recommendation to overrule Objection No. 22 be reversed and that the Board find that Petitioner unlawfully promised to waive union initiation dues in exchange for decertifying Intervenor.

C. INTERVENOR EXCEPTS TO THE ALJ'S RECOMMENDATION TO OVERRULE OBJECTION NO. 21, AS THE EVIDENCE SUPPORTS A FINDING THAT THE EMPLOYER ENGAGED IN SURVEILLANCE

The ALJ overruled Intervenor's Objection No. 21 over the Employer's unlawful surveillance of eligible voters on election day. Intervenor takes exception to the ALJ's findings and conclusions that serve as the basis to overrule Objection No. 21. (See Exception Nos. 7-9.)

In reaching the conclusion to overrule Objection 21, the ALJ misconstrued and ignored the evidence showing that management held meetings in the area of the polling site during polling sessions. In particular, the ALJ ignored documents showing that the Employer's managers held meetings in Conference Room A.[6] (See Intervenor Exh. 3). For example, management meetings were held in Conference Room A from 07:45 to 09:00, from 13:00 to 15:00, and again from

[6] The voting sessions were from 6:00 – 8:00 a.m., 12:00 – 1:00 p.m., 2:00 – 4:00 p.m., and 5:00 – 8:00 p.m. (Tr. 360-361).

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16:00 to 18:30. (Intervenor Exh. 3, p. 1).[7] Petitioner itself conceded that employees who were on their way to the polling room walked by Conference Room A. (Petitioner Exh. 4, photos 1 and 2; see also Tr. 321 and 338). The door to the conference room A was open at least during the meeting that was held during the first morning session. (Tr. 232-35). That the door to the room where managers held meetings was opened was corroborated with testimony that the noise from one of the meetings was clearly audible inside the polling room. (Tr. 428 and 430-31). Thus, in the face of this undisputed record, the ALJ's finding that "manager meetings took place outside the polling session periods" was contrary to the overwhelming evidence in the record.

In reaching the recommendation to overrule Objection 21, the ALJ also applied an inapposite legal standard. Specifically, the ALJ concluded that "there is no evidence that any of the Employer's managers were actually observing anyone going into or out of the polling area." This finding was in error because it raises a substantial question of law or policy for which there is no officially reported Board precedent. Under Board precedent it is unlawful for an employer representative to maintain a continued presence in an area where employees had to pass them through to vote and where the managers observed employees waiting in line to vote. See, e.g., *ITT Automotive*, 324 NLRB 609 (1997). But Board precedent does not require that an objecting party must also present evidence that managers "were actually observing anyone going into or out of the polling area."

As a result, Intervenor requests respectfully that the ALJ's recommendation to overrule Objection No. 21 be reversed and that the Board issue an order sustaining this objection.

D. INTERVENOR EXCEPTS TO THE ALJ'S RECOMMENDATION TO OVERRULE OBJECTION NO. 30, AS THE EVIDENCE SUPPORTS A FINDING THAT THE EMPLOYER DICRIMINATORILY ENFORCED ITS ACCES POLICY ON THE DAY OF THE ELECTION

The ALJ overruled Intervenor's Objection No. 30 over the Employer's election day enforcement of its security escort policy *only* on Intervenor's Representatives. Intervenor takes

[7] That management meetings were also scheduled during non-voting times is not an irrelevant fact because it is reasonable to conclude that managers would have arrived at the meetings prior to the scheduled start time and stayed after the scheduled end time.

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exception to the ALJ's findings and conclusions that serve as the basis to overrule Objection No. 30. (See Exception Nos. 17-21.)

In reaching the recommendation to overrule Objection 30, the ALJ misconstrued and ignored the evidence. In particular, the ALJ ignored evidence that the Employer required Intervenor's Representatives Felipe Garcia, Davere Godfrey, and Sharrion Marshall to be escorted by security officers when they accessed the facility on the day of the election. (Tr. 164, 325-27). The Employer had not required security guard escorts for at least a month prior to the election. (Tr. 214, 219, and 326-27). More importantly, Petitioner's organizer, Pat Alvarez, who entered the facility at the same time as Garcia and Godfrey, was not escorted by security guards. (Tr. 170). Petitioner's principal witness, Faye Roe, also revealed that her boss Sal Rosselli was not escorted when he entered the hospital on the day of the election. (Tr. 503-504). In the face of this unrebutted evidence, it was error for the ALJ to overrule Objection 30 based on the findings and conclusions set forth in the Report.[8]

As a result, Intervenor requests respectfully that the ALJ's recommendation to overrule Objection No. 30 be reversed and that the Board issue an order sustaining this objection.

E. INTERVENOR EXCEPTS TO THE ALJ'S DECISION TO GRANT THE PETITION TO REVOKE BECAUSE IT WAS NOT SUPPORTED BY THE LAW

Intervenor takes exception to the ALJ's denial of Intervenor's request for reconsideration of an Order issued on the first day of hearing revoking a subpoena duces tecum that Intervenor served on Petitioner on December 2, 2011. (See Exception Nos. 22-24.) The ALJ revoked the subpoena on the basis that it was untimely served because Petitioner was not provided five days to respond. (Tr. 205). As a result of the decision to revoke the subpoena, Intervenor suffered great prejudice in that it was denied documents that would have supported its objections.[9]

Intervenor excepts because the ALJ's decision raises a substantial question of law or policy for which there is no officially reported Board precedent. Specifically, in reaching the

[8] Intervenor also specifically objects to the ALJ's finding that Intervenor violated the Employer's rules on the day of the election, as there was no evidence in the record to support that finding.

[9] Intervenor does not except to the ALJ's finding that the subpoena is moot as to the challenge to the ballot of Reginald Wright and with regard to Objection No. 18. Intervenor, however, submits that the subpoena is not moot with regard to the remaining objections.

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decision to revoke the subpoena and to deny the request for reconsideration, the ALJ does not cite any controlling rule or case that stands for the proposition that a subpoena *must be served* five days prior to a hearing.

Here, prior to the start of the hearing, Petitioner filed an eight page Petition to Revoke the subpoena duces tecum relying in part on Section 102.66(c) of the NLRB Rules and Regulation. Section 102.66(c) provides that, if a party objects to a subpoena, it must file a petition to revoke within five days. As noted, Petitioner filed a petition to revoke the subpoena in this case within five days of being served with Intervenor's subpoena duces tecum, and so, Petitioner complied with this provision. Section 102.66(c), however, does not govern whether the subpoena itself was timely served, thus, the ALJ erred by relying on that section as cited by Petitioner to rule on the Petition to Revoke. For the same reason, the ALJ erred by relying on Section 102.31(b) of the Board Rules and Regulations in order to deny Intervenor's request for reconsideration.

Accordingly, Intervenor requests respectfully that the ALJ's decision to revoke the subpoena be overturned and that, should the above exceptions to the recommendations be denied, the Board issue an order requiring Petitioner to respond to the subpoena duces tecum.

F. INTERVENOR TAKES A LIMITED EXCEPTION TO THE PROPOSED LANGUAGE FOR THE SECOND NOTICE OF ELECTION

Intervenor takes a limited exception to the ALJ's recommendation that Petitioner be referred to as the "National United Healthcare Workers" with respect to the language in the Second Notice of Election that is being required pursuant to *Lufkin Rule Co.*, 147 NLRB 341 (1964). (See Exception No. 25.) As the record reflects, Petitioner's official name is the "National Union of Healthcare Workers (NUHW)." Accordingly, Intervenor requests respectfully that the Board issue an order correcting the proposed language for the Second Notice of Election.

G. INTERVENOR TAKES A LIMITED EXCEPTION TO THE DENIAL OF ITS REQUEST FOR AN EXTRAORDINARY REMEDY

Intervenor takes a limited exception to the ALJ's denial of Intervenor's request for an extraordinary remedy requiring Petitioner to mail a copy of the Second Notice of Election to each

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eligible voter. (See Exception No. 26.) The ALJ denied Intervenor's request for an extraordinary remedy on the basis that the request "is supported by the evidence and case law." Intervenor submits that the evidence supports the issuance of an extraordinary remedy because as the record reflects, just one vote affected the outcome of the first election in this case. In addition, Intervenor submits that the Board has the power and discretion to order that the notice of election be mailed to eligible voters. See, e.g., *J & R Flooring Inc. d/b/a J. Picini Flooring,* 356 NLRB No. 9 (2010). Accordingly, Intervenor requests respectfully that the Board issue an order requiring that Petitioner mail the Second Notice of Election to all eligible voters.

III. CONCLUSION

For the reasons stated above, Intervenor requests that the Board find merit to Petitioner's exceptions consistent with the arguments herein and Board precedent, and Intervenor requests that the Board issue an Order sustaining all of Intervenor's Objections to the election and requiring that Petitioner mail the Second Notice of Election, with Petitioner's correct name, to all eligible voters.

Dated: January 11, 2012

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By: _____
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PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On January 11, 2012, I served the following documents in the manner described below:

SEIU, UNITED HEALTHCARE WORKERS – WEST'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S REPORT AND RECOMMENDATIONS

☒ BY MAIL I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Alameda, California. I am readily familiar with the practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

☒ BY FACSIMILE I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 11, 2012, at Alameda, California.

J. L. Aranda

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